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IN THE

# Supreme Court of the United States

October Term, 1965
No. 583

CALIFORNIA DEMOCRATIC COUNCIL, *et al.*,

*Appellants,*

*vs.*

ROGER ARNEBERGH, *et al.*,

*Appellees.*

**On Appeal From the District Court of Appeal of the State of California, Second Appellate District, Division One.**

## JURISDICTIONAL STATEMENT.

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*vs.*

ROGER ARNEBERGH, *et al.*,

*Appellees.*

**On Appeal From the District Court of Appeal of the State of California, Second Appellate District, Division One.**

## JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the District Court of Appeal of the State of California, Second Appellate District, Division One, entered on April 5, 1965, affirming a Judgment of the Superior Court of the State of California for the County of Los Angeles granting a Motion for Judgment on the Pleadings and denying an Injunction on the grounds that the State Statute here involved is constitutional and may be constitutionally applied to all of the Appellants. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the Appeal and that substantial questions are presented.

## Opinion Below.

The opinion of the District Court of Appeal of the State of California, Second Appellate District, Division One, is reported in 233 A.C.A. 508, 43 Cal. Rptr. 531 (1965). A copy of the Opinion is appended hereto as Appendix A.

## Jurisdiction.

This suit was brought in the Superior Court, a court of General Jurisdiction in the State of California, as an action for Declaratory Relief under which Appellants challenged the constitutionality of Sections 8600, 8601 (3) and (4), and 8603 through 8606, inclusive, of the Elections Code of the State of California. The Appellees moved for judgment on the pleadings and interposed a General Demurrer to the Amended Complaint. They thereby sought to sustain the validity of the challenged sections of the Elections Code. On April 1, 1964, the Superior Court of the State of California for the County of Los Angeles granted the Appellees' motion and specifically found that the Amended Complaint did sufficiently state facts upon which the Court could make a declaration as to the constitutionality of these fortunate sections of the Elections Code. Said Superior Court adjudged said Elections Code provisions constitutional and that they may be constitutionally applied to all of the Appellants. A copy of the judgment, dated April 9, 1965, is appended as Appendix B. The Judgment of the Superior Court was affirmed by the District Court of Appeal of the State of California Second Appellate District, Division One on April 5, 1964. A Petition for Rehearing was denied by the said District Court of Appeal on April 23, 1965. A

Petition for a Hearing by the Supreme Court of the State of California was denied on June 2, 1965.

Notice of Appeal to the Supreme Court of the United States was filed in the said District Court of Appeal on July 22, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court, to review the said final judgment: *Williams v. Bruffy*, 96 U.S. 176, 183 (1878); *Talley v. California*, 362 U.S. 60, 62; *Lovell v. City of Griffin, Ga.*, 303 U.S. 444 (1938); *Smith v. California*, 361 U.S. 147 (1960).

**Question Presented.**

Do Sections 8600, 8601(3) and (4), and 8603 through 8606, inclusive, of the California Elections Code which require volunteer political organizations to label their political literature on threat of criminal penalties or injunctive action violate the United States Constitution?

Appellants contend that they do because:

1. They establish a prior restraint on free speech, free press and free association in the operation of the electoral processes.

2. They do not prevent the evil which the authors claimed the law was drafted to curb.

3. They unconstitutionally discriminate against volunteer political workers and deprive them of equal protection of the laws.

4. They impose a heavy burden on persons participating in election campaigns.

5. They are vague and indefinite although they seek to punish violation as a felony.

6. Section 8605 is preempted by the provisions of the Federal Communications Act.

## Statutes Involved.

Sections 8600, 8601 (3) and (4), and 8603 through 8606, inclusive of the Elections Code of the State of California, are appended hereto as Appendix C.

## Statement of the Case.

1. *Nature of the Action and Relief Sought.* The Appellants are a non-profit California corporation which is a volunteer political organization of members of the Democratic Party, an individual registered Democrat appearing for himself and as representative of other registered Democrats affiliated with the California Democratic Council and other Democratic Clubs and Councils, a Democratic State Assemblyman, a Democratic State Senator, and a Democratic United States Congressman. [Tr. pp. 24, 33, 34, 35, 36.] By an Action for Declaratory Relief the Appellants challenged the constitutionality of Sections 8600, 8601(3) and (4), and 8603 through 8606, inclusive, of the Elections Code. [Tr. pp. 24-39.] The Appellees are the City of Los Angeles, County of Los Angeles, and State of California, and their chief law officers charged with the enforcement of those portions of the Elections Code. [Tr. pp. 24-25.] The Appellees moved for Judgment on the Pleadings and interposed a General Demurrer to the Amended Complaint to attack the sufficiency of the Amended Complaint to state a cause of action for declaratory relief as a matter of law, thereby seeking

to sustain the validity of the challenged Sections of the Elections Code. [Tr. pp. 40-43.]

The federal question was initially raised in the Complaint [Tr. pp. 1-15] and the Amended Complaint [Tr. pp. 24-39]. A detailed argument on the federal questions was presented to the Trial Court orally and by Appellants' Points and Authorities in opposition to Motion for Judgment on the Pleadings and General Demurrer [Tr. pp. 59-89].

2. *Summary of Material Facts.* The California Democratic Council is a non-profit California corporation which for over ten years has functioned as an organization, now composed of about 70,000 registered Democrats who in clubs, councils and conventions discuss issues facing the California voters and make pre-primary endorsements of candidates for nomination in the direct party primary of the Democratic Party. These endorsements are made when a broad consensus of the volunteer Democratic Party workers indicate their preference in open conventions on the state and local district levels. These conventions meet after proper notice and act through a representative group of the club members using due process in making their choice. [Tr. pp. 25-26.] These techniques obtain and publicize the viewpoint of a broadly based consensus of those who best know the individuals presenting themselves for nomination. This enables the members of the clubs affiliated with the California Democratic Council to carry out their civic functions as citizens of a democracy.

The pre-primary endorsements of the California Democratic Council are sought by Democratic candidates for nomination. [Tr. pp. 34, 35, 36.] After ob-

taining such pre-primary endorsements these endorsements are published and advertised in pamphlets, newspapers, handbills, on the radio and television and by other means of communication. The California Democratic Council publishes a "slate mailer" which consists of a postcard sent to all registered Democrats in the State of California and containing a list of those candidates for the nominations in the direct party primary who have the endorsement of the California Democratic Council. [Tr. p. 26.]

The 1963 State Legislature passed Assembly Bill 2922 which contained purported requirements that the advertisements, radio and television broadcasts, bills, pamphlets and postcards containing pre-primary endorsements also carry a notice to voters, stating that it is required by law, that the endorsement is by an unofficial party group, and that the official organizations of the Democratic Party are prohibited by law from endorsing candidates in primary elections. [Tr. pp. 26-27.] The legislation purports to establish the size of the notice to voters in type or lettering at least half as large as the type or lettering of the statement of endorsement or in 10-point roman type, whichever is larger, and requires it to be in a printed or drawn box set apart from any other printed matter. The notice must appear on each surface, page or fold of the document, or in the case of broadcast or telecast, read in full. A similar, but shorter notice is required on post cards, and it must be printed in 10-point boldface type on each surface bearing an endorsing statement.

In the event of a suspected violation of the statute, the Appellants might be subjected to the charge of committing a felony. Any attempt to print, publish or

distribute the political literature proscribed by the statute may subject them to a restraining order or injunction. [Tr. pp. 31-32.] The threat of such criminal or civil proceedings inhibits the appellants in the exercise of their political rights. [Tr. p. 32.]

The California Democratic Council has no desire to print such a notice on any of its material. [Tr. pp. 27-28.] The individual Appellants in the case do not desire to print such notices on any of their material which relates to their pre-primary endorsements. [Tr. pp. 34, 35, 36, 37.] They assert that the requirements of the law are invalid and seek a declaration that it violates both Federal and State Constitutions. [Tr. pp. 28-34.]

3. *Judgment of the Superior Court.* The Appellees' Motion for Judgment on the Pleadings was granted by the Honorable Trial Court on the grounds that the Amended Complaint did not state facts sufficient to constitute a cause of action for an injunction. The Court did find specifically that the Amended Complaint did sufficiently state facts upon which the Court could make a declaration as to the constitutionality of those sections of the Elections Code involved in the proceeding. [Tr. pp. 46-47.] Therefore, the Court adjudged Elections Code, Sections 8600, 8601(3) and (4), and 8603 through 8606 constitutional and may be constitutionally applied to all of the Appellants. [Tr. p. 47.] The Trial Court passed upon the federal questions in its Minute Order granting the Motion for Judgment on the Pleadings [Tr. p. 45] and in the Judgment itself. [Tr. pp. 46-47.]

Judgment was granted for the Appellees and against all of the Appellants.

On appeal the allegations of the Amended Complaint must be taken as true, and so taken the question is whether a cause of action has been stated.

> *Petermann v. International Brotherhood of Teamsters,* 174 Cal. App. 2d 184, 344 P. 2d 25 (1959).

4. *Ruling on Appeal.* Appellants raised the federal questions in detail with citation of authority in the Opening and Reply Briefs in the California District Court of Appeal, in the Petition for Rehearing in the District Court of Appeal and in the Petition for Hearing in the California Supreme Court. The federal questions were passed upon adversely to Appellants, sustaining the validity of the statutes involved, in the Opinion of the District Court of Appeal affirming the Judgment. The Petitions for Rehearing and for Hearing in the California Supreme Court were denied.

**The Federal Questions Are Substantial.**

The legislation at bar here has gone much farther than merely requiring identification. (*Cf. Talley v. California,* 362 U.S. 60 (1960).) It has singled out specific groups which are active in party primary campaigns. They act in a voluntary and unofficial capacity. The Legislature, seeking to isolate their particular form of endorsement from all other types of endorsements in the party primary, has required not only that they label themselves as unofficial but that they indicate the limitation of powers of official party groups in direct party

primaries. That requirement may not constitutionally be imposed by *ex parte* restraining orders and criminal sanctions upon those exercising their rights in the direct party primary. *Talley* left unanswered the areas in which some regulation might be permissible and the limitations on the scope of that regulation. The law of political campaigning needs to be further clarified. Important questions of law have arisen in this case and should be settled, because this case would go beyond the limitations imposed in *Talley*.

In addition, the line of cases, of which *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Garrison v. Louisiana*, 33 U.S. Law Week. 4019 (1964), are the most recent, indicate that the areas of free expression are broad. During the last term, the U.S. Supreme Court spoke again to limit summary restraint on free expression. *Freedman v. Maryland*, 33 U.S. Law Week. 4211 (1965).

This legislation effects a prior restraint by establishing in the legislation an alleged fact of doubt, confusion, or deceit, and, based upon that conclusion, making a legislative determination that anyone so acting should be restrained in disseminating political information. Because free speech in the vital electoral area is involved and because the statute would impose, not only injunctive but also criminal sanctions on those who seek to assert their rights, substantial federal questions of law are raised here.

## I.

**The Statute Is Unconstitutional by Requiring a Special Notice, Which Calls Attention to the Unofficial Character of the California Democratic Council and States That Official Party Organizations May Not Make Pre-Primary Endorsements, to Be Placed on or Read With All Advertising Material Containing Statements of Pre-Primary Endorsements and by Establishing a Prior Restraint on Free Speech, Free Press and Free Association in the Electoral Process, the Most Vital Channel of Communications in the Most Sensitive Area of Civil Liberty.**

The California Democratic Council has encouraged a broad consensus in making pre-primary endorsements of candidates and direct action participation in legislative programs, thereby giving its members responsibilities in political affairs. This enables individual citizens to develop a political relation to the party leaders who exercise power over these citizens.

> "The freedom of the individual to participate in political activity is a fundamental principle of a democratic society and is the premise upon which our form of government is based. Our state Constitution declares, 'All political power is inherent in the people' (Const., Art. I, §2), and the First Amendment of the federal Constitution establishes the right of every citizen to engage in political expression and association."
>
> *Fort v. Civil Service Commission,* 61 Cal. 2d 331, 334-5, 392 P. 2d 385 (1964).

In order to bring the message to the electorate, volunteers undertake various activities which are the very

essence of the democratic structure of our Government. An infringement upon them becomes an infringement upon the basic freedom with which American citizens are endowed. The Supreme Court of the United States recognizes that

> "effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association as this Court has more than once recognized in remarking upon the close nexus between freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due-Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."
>
> *National Association for the Advancement of Colored People v. Alabama,* 357 U.S. 449, 460 (1958).

The significance of the political activity generated by the California Democratic Council has been well expressed by Justice Stewart:

> "Like freedom of speech and free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the

> establishment of justice and the preservation of liberty. U.S. Constituion, Amend. 1. And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due-Process Clause of the Fourteenth Amendment from invasion by the States. . . . Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference."
>
> *Bates v. Little Rock,* 361 U.S. 516, 522-523 (1960).

The subtle pressures of governmental interference of these rights of free expression and free association are areas of civil liberties to which the highest Constitutional authority is now particularly sensitive. *Talley v. California,* 362 U.S. 60 (1960). *Speiser v. Randall,* 357 U.S. 513 (1958). (See particularly the concurring opinions of Justices Black and Douglas commencing at 357 U.S. 530.) *Louisiana v. National Association for the Advancement of Colored People,* 366 U.S. 293, 296 (1961).

The interference here is subtle. The California Democratic Council is a nationally known volunteer political organization. One of its principal functions is to make pre-primary endorsements. The full value of the pre-primary endorement is achieved by publishing to members of the California Democratic Council and the public at large the fact that a group of volunteer political workers have, in open convention, expressed their choice for a candidate for nomination in the party primary. No attempt is made to masquerade as the official party organization. As a matter of fact, great pride is taken

in the status of the California Democratic Council as a group of volunteers, unpaid party members not acting in any official capacity.

Elections Code, Sections 8603 through 8606 inhibit the manner of publishing the fact of the endorsement. If it is by printing on a placard, handbill or other advertisement, a notice to voters must be affixed. If it is by radio or television advertisement, the notice must be read in full. The notice is designed to increase the cost and interfere with the publicizing of pre-primary endorsements, to degrade the publication of the pre-primary endorsement by the California Democratic Council, and to inhibit the political activity of volunteers by casting doubt on whether they have complied with the law. The statute accomplishes these purposes by requiring that some act be a condition precedent to the exercise of free speech, free assembly, and free press or suffer either injunction or criminal law sanctions.

> "The expression of bloc sentiment is and always has been an integral part of our democratic electoral and legislative process. They could hardly go on without it. Moreover, to an extent not necessary now to attempt delimiting, that right is secured by the guaranty of freedom of assembly, a liberty essentially coordinate with the freedoms of speech, the press, and conscience. Cf. Bowe v. Secretary of Commonwealth, 320 Mass. 230, 251, 252, 69 NE2d 115, 167 ALR 1447. It is not by accident, but by explicit design, as was said in Thomas v. Collins, supra (323 U.S. at 530, 89 L. ed 440, 65 S Ct 315), that these freedoms are coupled together in the First Amendment's assur-

ance. They involve the right to hear as well as to speak, and any restriction upon either attenuates both.

"There is therefore an effect in restricting expenditures for the publicizing of political views not inherently present in restricting other types of expenditure, namely, that it necessarily deprives the electorate, the persons entitled to hear, as well as the author of the utterance, whether an individual or a group, of the advantage of free and full discussion and of the right of free assembly for that purpose."

Mr. Justice Rutledge, dissenting in *United States v. C.I.O.*, 335 U.S. 106, at 143 (1948), joined by Justices Black, Douglas and Murphy.

Tested by the principles enunciated by Mr. Justice Rutledge and concurred in by Justices Black, Douglas and Murphy, which principles have been universally followed in recent cases before the U.S. and California Supreme Courts the legislation challenged here strikes at the very heart of the electoral process, publication by voters of their support and endorsement of candidates. This is where the electoral process requires the greatest freedom of expression so that the exercise of the right of free assembly may be meaningful in choosing the officers of government.

Recently the United States Supreme Court has taken occasion to strike down the civil libel law of a state which interfered with the expression of opinion in a paid advertisement seeking contributions and support in connection with the integration movement.

*The New York Times Company v. Sullivan*, 376 U.S. 254 (1964).

The issue here is analogous to the issues in *The New York Times* or in any of the recent cases involving the N.A.A.C.P. What Appellants are attempting to do is open up and broaden the area of debate and discussion on political issues. It is for the people in the forum of public debate to make the decisions. *The New York Times* recognized the fact that the material printed in the advertisement might have been false and probably was. But it involved the criticism of a public official, and although the comments might be untrue in fact or derogatory to the character of that official, unless there was actual malice, an official privilege exists against a threat of damage suits in order to prevent inhibiting the vigorous and effective administration of the policies of government by censorship, even self-censorship.

The U.S. Supreme Court there took pains to restate the general principles in the following language:

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v. United States,* 354 U.S. 476, 484. 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' *Stromberg v. California* 283 U.S. 359, 369. [I]t is a prized American privilege to speak one's mind, although not al-

ways with perfect good taste, on all public institutions,' *Bridges v. California,* 314 U.S. 252, 270, and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.' *N.A.A.C.P. v. Button,* 371 U.S. 415, 429. The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press,* 52 F. Supp. 362, 372 (D.C.S.D. N.Y. 1943). . . .

"That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,' *N.A.A.C.P. v. Button,* 371 U.S. 415, 433, was also recognized by the Court of Appeals for the District of Columbia Circuit in *Sweeney v. Patterson,* 128 F. 2d 457, 458 (1942)."

*The New York Times v. Sullivan,* 376 U.S. at 270, 271-272 (1964).

Seen in this light the legislation in the Elections Code requiring a notice to voters really amounts to self-censorship. It forces the person publishing the facts of an endorsement or support to censor his material or suffer either civil or criminal sanctions. The fact that this self-censorship may be justified in the interest of preventing even an implication of a falsehood has also been answered by the United States Supreme Court in *The New York Times.*

"The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly mde is no less essential here than was the requirement of proof of guility knowledge which, in *Smith v. California,* 361 U.S. 147, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale. We said:

> 'For if the bookseller is criminally liable without knowledge of the contents . . . he will tend to restrict the books he sells to those he has inspected, and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature . . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted . . . [H]is timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to the form of the printed word which the State could not constitutionally suppress directly. The bookseller's self censorship compelled by the State would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded.' (361 U.S. 147, 153-154).

"A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.' . . . Under such a rule, would-be

> critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' *Speiser v. Randall, supra,* 357 U.S., at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments."
>
> *The New York Times,* 376 U.S. at 278-279 (1964).

The Legislature here has sought to regulate far beyond the limitations the Courts have imposed. A. B. 2922 is no mere disclosure bill. It not only requires a statement purporting to describe volunteer political organization in negative terms, but the Notice also must summarize the limited power of *other* political organizations. This certainly is too great a price to pay constitutionally for truthfully and openly signing political tracts with the name of the political group which is disseminating it.

The restrictions on political advertising sought here are far broader, for example, than statutory restrictions on commercial advertising, which condemn untrue or misleading statements, although the Legislature attempted to draw an analogy to them. (Elections Code, Section 8601(4)).

*Bus. & Prof. Code,* Sec. 17500;

*Civil Code,* Sec. 3369.

The legislative finding employed the analogy to regulation on commercial advertising under the police power of the State or Federal government. However, it is clear that the powers which are available to the government in regulating commercial advertising are not available in connection with restrictions on free speech involving fundamental rights. This has been restated as recently as *New York Times v. Sullivan,* 376 U.S. 254, 266 (1964), where the question of free speech was considered and the rights upheld even though the "advertisement" in question was paid for, since it was not commercial advertising.

See:

*Valentine v. Chrestensen,* 316 U.S. 52, 54 (1941);

*Murdock v. Pennsylvania,* 319 U.S. 105, 108 (1942).

There is no doubt here that any advertisement regarding pre-primary endorsements would not constitute commercial advertising. The analogy to cases involving commercial advertising states an inapplicable rule. The reasons that no cases could be found of a nature similar to this type of situation, as the Court below recognized, are that constitutionally such action would be barred and that this is the first attempt to restrict pre-primary endorsements by volunteers which constitute a new trend in politics originating in the State of California.

Both State and Federal Supreme Courts have held unconstitutional a penal statute which "sweeps within other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself

to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective, or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship."

*In re Blaney,* 30 Cal. 2d 643, 653, 184 P. 2d 892 (1947);

*Thornhill v. Alabama,* 310 U.S. 88, 96 (1940)

Tested by these principles, the restraints imposed by the Elections Code provisions challenged here should be held to be unconstitutional.

II.

**Elections Code, Sections 8603-8606 Violate the Due Process of Law Clauses of the Federal Constitution in That They Do Not Prevent the Evil Which Their Authors Claim That They Were Drafted to Curb.**

It is contended that the matter troubling the Legislature was public doubt and confusion as to whether preprimary endorsements are those of a private group of citizens or of an official governing body of a political party. Elections Code, Section 8601(3). That evil is the one which must be considered here. Elections Code, Section 8602 not challenged here, tends to solution if a problem exists. It specifically prevents any candidate or any person on his behalf from claiming that he is the official candidate or the official endorsed candidate of that political party. If necessary, the Legislature might even require that no organization may claim that it is

one of the official governing bodies of a party qualified to participate in the direct primary election. If the evil which is troubling the Legislature is deception, it may be reached by easily drafted legislation: Forbid the intentional fraud of stating that a group is the official party.

At no time have the Appellees nor anyone else argued, nor can they, that the Legislature held any hearings or found any basis to support the legislative finding that there was doubt or confusion created by pre-primary endorsements by unofficial organizations using as part of their names the name of a political party. See Elections Code, Sec. 8601(3). As a matter of fact, the undisputed facts in the case are that the California Democratic Council and the other Appellants have taken pride in the fact that they are a volunteer political group and do not masquerade as official party organizations. Even more significant, there is no support at all, either in any legislative history or even in any legislative findings, for asserting in the Elections Code, Section 8601-(4) that the public should be protected from deception by reason of the publication of pre-primary endorsements.

The purported legislative findings as to doubt or confusion do not support a remedy against fraud, deceit, or falsehood in connection with the publicizing of pre-primary endorsements. All the facts in the case are to the contrary.

A regulation of conduct which incidentally affects the communication of ideas must serve a substantial public interest and be narrowly drawn to keep interference with communication to a minimum. It must be "highly selective" in order to survive First Amendment

challenge. (*Louisiana ex rel. Gremillion v. N.A.A.C.P.*, [366 U.S. 293, 296 [81 S. Ct. 1333, 6 L. Ed. 2d 301, 304].) "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." (*Shelton v. Tucker, supra*, 346 U.S. at p. 488 [5 L. Ed. 2d at p. 237].) In the protection of constitutional freedoms it is the duty of the court to determine whether the action bears a reasonable relation to the achievement of the governmental purpose asserted as its justification. (*Bates v. City of Little Rock, supra*, 361 U.S. at p. 525 [4 L. Ed. 2d at p. 487].)

In *Talley v. California*, 362 U.S. 60 (1963), the Court invalidated a city ordinance which broadly prohibited distribution of handbills not disclosing the name and address of the sponsor. The Court stated: "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." (362 U.S. at p. 64 [4 L. Ed. 2d at p. 563].) The prohibition against anonymity was subject to the infirmity that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." (362 U.S. at p. 65 [4 L. Ed. 2d at p. 563].) A claim that the ordinance would require identification of those responsible for fraud, false advertising and libel was met with the rejoinder that the ordinance was not so limited. "Therefore," said the court, "we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils." (362 U.S. at p. 64 [4 L. Ed. 2d at p. 562].) Accordingly, the ordinance was nullified as an abridgement of free speech and free press.

There may be a basis for legislative concern about "false, misleading or irresponsible literature" or even

of "smear sheets" circulated anonymously. See *Canon v. The Justice Court,* 61 Cal. 2d 446, 393 P. 2d 428 (1964). But no "public doubt or confusion" about pre-primary endorsements by bona fide volunteer political groups has ever come within the area of legislative investigation. The legislative history of A. B. 2922, the statute at bar here, shows, quite the contrary.

Here is a striking example of a penal statute that "does not aim specifically at evils within the allowable area of state control."

*In re Blaney, supra;*
*Thornhill v. Alabama, supra.*

A. B. 2922 inhibits the expression of political opinion. Since that portion of the legislation under attack here does not bear a reasonable relationship to the evil sought to be curbed, it violates the requirements of due process of law.

III.

**The Requirements of the Notices to Voters in Elections Code, Sections 8603 Through 8605, Inclusive, Impose a Heavy Unconstitutional Burden on Persons Seeking to Publicize Pre-Primary Endorsement Information in Election Campaigns.**

From a constitutional point of view, the inhibition of the civil libel judgment in *The New York Times, supra,* is no more restrictive than the requirements of the notices to voters promulgated in Elections Code, Sections 8603 through 8605.

*Talley v. California, supra,* stands for more than voiding an ordinance which establishes a disclosure requirement for all hand bills. The language and the

logic carry greater meaning. The Court noted the importance of an anonymity which enable persecuted groups and sects to criticize oppressive practices in laws without an obnoxious press licensing law or other requirements which lessen the circulation of literature. Most recently members of groups under attack have resorted to anonymous free expression to avoid pressure. See *Bates v. Little Rock, supra; National Association for the Advancement of Colored People v. Alabama, supra.* These cases teach that burdens which inhibit publication or create pressures or threats against persons who would publish, violate First Amendment freedoms of expression. The requirement of the Notice to Voters in the legislation here with its criminal sanctions for violation is an inhibiting pressure.

The practical burden of the Notice on publication is even more striking. It is commonly known that radio and television political advertising during a campaign year consists primarily of the use of ten or twenty-second radio or television spots. The Court may itself ascertain that the reading of the Notice takes from seven to nine seconds depending on the manner of speaking. The requirement prevents the use of the ten second spot, and effectively destroys the utility of the twenty-second spot.

On handbills and billboards the size of the Notice required will make endorsements by volunteer groups substantially more unusable and ineffective. If the law is interpreted to mean that the Notice to Voters must be not less than half the size of the endorsement statement, the entire Notice to Voters may well be larger than the endorsement itself since the number of words required for the notice is far greater than the simple

statement usually used in political advertisements referring to political endorsement or support.

The form of sanctions also impose an unconstitutional burden. A violation of some sections of the law constitutes a felony. Elections Code, Sections 29,000 and 29,001. A volunteer may commit a crime by distributing a political tract. It is a hardy soul who will pay that price to participate in volunteer political activity. A violation of the 8603, 8604 and 8605 does *not* require scienter. A strict or absolute criminal liability is imposed. Legislation which holds distribution of information criminal and dispensing with the requirement of scienter is unconstitutional.

*Smith v. California,* 361 U.S. 147 (1959).

This legislation also inhibits free expression through civil judgment in injunction proceedings. Elections Code, Section 8606. The safeguards of the criminal law in requiring an indictment and proof beyond reasonable doubt are not available. As in *The New York Times, supra,* the civil sanction may be substantially more effective. The injunction may be sought at that crucial moment after a large amount of money has been paid and the printing is published and ready to be distributed or just before the billboards are posted. Then the injunctive proceeding is initiated. During the last week or two of a political campaign the most urgent demand exists for opportunities for broad public expression. Parties attempting to publicize the fact of support or endorsement will be inhibited by injunction proceedings which after the election may turn out to be unfounded. No award of damages can compensate for the loss of the election. No clear and present danger justifies

such repression. *The New York Times v. Sullivan, supra.*

This legislation provides for application of temporary restraining orders and injunctive proceedings. Elections Code, Section 8606. Temporary restraining orders may be obtained *ex parte* and without any opportunity for the person who seeks to disseminate the fact of pre-primary endorsement to oppose the granting of the temporary restraining order. Code of Civil Procedure, Section 527. This may be done during the last crucial days of a campaign at which time, the matter of dissemination of information in a timely manner becomes of vital concern. By this sanction, the legislation allows a restraint without a hearing upon free expression in the electoral area. Furthermore, the legislation carries the presumption that the dissemination of the information without complying with all of the requirements of the legislation by certain volunteer political workers is deceitful or confusing. None of these facts must be established judicially in order to effect the restraint.

*Cf. A Quantity of Copies of Books v. Kansas,* 378 U.S. 205 (1964).

Although the Legislature may choose the types of sanctions, it wishes to impose, in this area the sanctions must afford to persons exercising their right of free speech, all the opportunities of procedural and substantive due process.

*Marcus v. Search Warrant of Property,* 367 U.S. 717 (1961);

*Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963).

This legislation does not do so. It does not even attempt to provide the safeguards which the U.S. Su-

preme Court in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1957),

> "tolerated . . . only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint."
>
> *Bantam Books, Inc. v. Sullivan, supra,* 372 U.S. at 70.

A statute which is broadly and loosely drawn and which places it within the power of a court to grant injunctive relief which by its terms may be used to strike down the right to freedom of speech, is a prior restraint upon that right and falls squarely within the rule invalidating sweeping legislative restrictions on free expression.

> *In re Blaney,* 30 Cal. 2d 643, at 651, 184 P. 2d 892 (1947).

Numerous attempts were made to enjoin political literature in the 1964 California Direct Party Primary under color of the statute involved here. Not only were temporary restraining orders issued in these cases, but, in several, preliminary injunctions were decreed. Nevertheless, the statute should be tested on its face.

> "Proof of the abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. (Citations.) The cases when interpreted in light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an

appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. (Citation.) One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it." (Citations.)

*Thornhill v. Alabama,* 310 U.S. 88, 96 (1940);

*In re Blaney,* 30 Cal. 2d 643, 652, 184 P. 2d 892 (1947);

*Fort v. Civil Service Commission,* 61 Cal. 2d 331, 392 P. 2d 385 (1964).

The legislature also created an unconstitutional burden by establishing a legislative presumption in Section 8601 that some type of publication has confused or created public doubt in the minds of the citizenry and stating that the voting public is entitled to protection from deception in political campaigns in the same manner and for the same reasons that it is entitled to protection from deception by advertisers of commercial products. Yet we have seen not only that the advertising of commercial products carries an entirely different and less burdensome requirement but also that there is a sharp constitutional difference between commercial advertising and political opinions.

Moreover, the legislature may not declare by some type of finding that a person is guilty and thrust upon that person the burden of proving his innocence. It is not within the province of the legislature to declare an individual guilty or presumptively guilty of a crime, See *Speiser v. Randall,* 357 U.S. 513, at pages 523-524 (1958). This is particularly true where free expression is involved and where the complexity of the proofs and the generality of the standards provide but shifting sands on which the litigant must maintain his position. As the Court said in *Speiser v. Randall, supra,* 357 U.S. 513, at page 526, "In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions."

## IV.

## Elections Code, Sections 8603 Through 8606, Unconstitutionally Deprive Volunteer Political Groups of Equal Protection of the Law and Due Process of Law by Establishing an Arbitrary Classification.

This legislation strikes hardest at those organizations which are most vitally interested in making pre-primary endorsements and taking an active part in political campaigns through expressing their preference for candidates for public office and working to publish the fact of that support. The legislation ignores com-

pletely those who publicize their opposition to candidates.

Both the California Democratic Council and the California Republican Assembly are statewide organizations composed of local clubs and councils which make pre-primary endorsements. Other organizations make endorsements as well, and their voices may sometimes be even louder. Organized labor, special interest groups, veterans groups, and even political parties who are not qualified on the ballot endorse or support candidates. Individuals who call themselves either Democrats or Republicans are completely free under the law to identify themselves as such, using the name of Democrat or Republican, and to publicize their endorsement or support in the press, on billboards, handbills, or over radio and television. Other individuals who are well recognized political leaders of the official parties are permitted to make endorsements using their official party titles. There is no requirement or limitation imposed upon their endorsement by a notice of any kind that they speak only as private citizens and not in their official capacities. If there is a danger that the public will be confused as to endorsements, it would appear to be in this area. But instead the Legislature has singled out volunteer political groups for regulation.

The law enacts discrimination which is not constitutionally protected. It creates a special class of citizens to impose a regulation on free expression. If the group uses their individual names and describes themselves as Democrats or Republicans, they escape the force of the statute. But if they use a collective name they must abide by the legislative infringement on their freedom. Specific group action thereby suffers unconstitutional discrimination.

Most recently, in the area of political literature, the California Supreme Court struck down, as unconstitutional, legislation which arbitrarily classified only a portion of the community. The validity of classification must appear clearly when a fundamental right is involved. *Canon v. The Justice Court, supra.*

## V.

## Elections Code, Sections 8603 Through 8605 Are Unconstitutionally Vague and Indefinite, Thereby Denying Plaintiffs Due Process of Law.

The statute is replete with ambiguity and vagueness.

> "Where a provision restricting free speech and the free dissemination of ideas is involved, a court in considering the claim of overbreadth and vagueness may take into account the operation of the provision as to factual situations other than the one at bar."
>
> *Fort v. Civil Service Commission,* 61 Cal 2d 331, 339, 392 P. 2d 385 (1964).

A. B. 2922 applies to endorsements of a "political party organization" or "organizations using as a part of their name the name of a political party or a derivative thereof." None of these terms is defined in A. B. 2922. Does any use of the name Democratic or Republican or the initials "D" or "R" constitute a "derivative"? Does the California Democratic Council use the name of the party? Does it do so when described as the "C. D. C."? What about "Democrats for Brown"? Since the law refers to matter "having reference to endorsement" does it encompass statements by opponents that a candidate is endorsed by one of the organizations involved?

The size of the disclaimer is ambiguous. Does the law require an endorsement of Governor Brown on a billboard which carries his name in six foot letters to have the disclaimer in a box with letters three feet high? What statements or words are referred to? Are just the words, "endorsed" or "supported by" or are the candidates' names and offices included? What is the rule in the following case:

| | |
|---|---|
| California Democratic Council | (1 foot high) |
| endorses | (1 foot high) |
| Brown | (2 feet high) |
| For | (8 inches high) |
| Governor | (3 feet high) |

What size type should carry the Notice? The statute give no guidance.

The bill purports to exclude certain newspapers or magazines. But if carefully read, it applies only to those which in the ordinary course of business publish *political* news items, comments or articles. Does it exempt the Democratic Digest, published by the Democratic State Central Committee, and the C. D. C. Bulletin? Nation Magazine is probably exempt. But is Sunset exempt if it publishes a story about a C. D. C. endorsed candidate supporting conservation? What about corporate or union house organs?

The provision on postcards (Section 8604) introduces the word "committee" not otherwise used or defined. Whom do they constitute? The law refers vaguely to statements or words in Section 8603. It states that Section 8604 shall not apply to any matter which bears the word "official" followed by the name of the party or derivative thereof or the words "officially endorsed",

or to any matter violating Section 8602. Does this mean that a postcard saying "Official C. D. C. Endorsement" does not have to carry any qualifying phrase or that it must carry the entire notice? Are there any penalties imposed for payment of material violating Section 8604?

Must there be a box disclaimer for each endorsement by each separate political party organization or only one for all of them? How then describe which are the ones to which it applies, since the disclaimer is specifically and inflexibly worded?

It is well established that the conduct proscribed which works to limit freedoms of expression must be defined specifically so that the person or persons affected remain secure and unrestricted in their rights to engage in activities not encompassed by the legislation. *Cantwell v. Connecticut,* 310 U.S. 296 (1952).

> The United States Supreme Court has only recently reiterated that . . . "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law . . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed of what the State commands or forbids . . . Words which are vague and fluid . . . may be as much a trap for the innocent as the ancient laws of Caligula . . . Stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril

here, because the free dissemination of ideas may be the loser . . . The maintenance of the opportunity for free political discussion to the end that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.

*Cramp v. Board of Public Instruction,* 368 U.S. 278, 286 (1961).

See also,

*In re Blancy, supra.*

## VI.

## Elections Code, Section 8605 Requires the Publication of a Notice to Voters by Radio or Television and Unconstitutionally Invades a Field Preempted by the Federal Government.

The Federal Communication Act clearly provides that the Federal Communication Commission has no power to censor radio communications nor can it create any regulation or condition which would interfere with the right of free speech by radio communications.

47 U.S.C., Sec. 326.

Furthermore, in the area of political expression the Communications Act specifically provides equal time provisions for candidates and prevents any station from censoring such material.

47 U. S. C., Sec. 315.

It is clear that Section 326 declaring national policy has occupied fully the field of program control, and that field is no longer open to the States.

*Allen B. Dumont Laboratories v. Carroll,* 184 F. 2d 153, 156 (C. A. 3, 1950), *cert. den.* 340 U.S. 929.

The citation by the Honorable Court below of *Head v. Board of Examiners,* 374 U.S. 424 (1963), should not be authority for the decision here since it involved regulation by a State of commercial advertising. However, it is clear that where the matters do not involve commercial advertising, but political information, no one, including the Federal Communication Commission, has the power to censor or regulate what appears on television or is said on radio. By establishing in 47 U.S.C. 315, that limited area in which political expression is to be regulated, the Federal law excludes any other regulation of political broadcasts. In *Head,* no comparable provision to regulate commercial advertising existed to show Congressional concern.

Therefore, where, as here, the regulation of political broadcasting as well as broadcasting generally was undertaken by the Federal Government, the states have no right to interfere.

See also:

*Farmers Educational and Cooperative Union of America v. WDAY,* 360 U.S. 525, 535, fn. 19 (1959).

Because of the supremacy clause of the United States Constitution it is clear that Section 8605 invalidly invades an area pre-empted by the Federal Government.

United States Constitution, Art. VI.

## Conclusion.

The Appellants respectfully submit that this Honorable Supreme Court should take jurisdiction herein in order to consider the claim for constitutional protection of the rights of vounteer political workers, since the questions presented by this appeal are substantial and of paramount public importance.

Respectfully submitted,

LEON M. COOPER,
*Attorney for Appellants.*

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## APPENDIX A.

### Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

California Democratic Council, etc. et al., Plaintiffs and Appellants, vs. Roger Arnebergh, et al., Defendants and Respondents. Civil No. 28396.

Filed, April 5, 1965.

Appeal from a judgment of the Superior Court of Los Angeles County. Shirley M. Hufstedler, Judge.

Leon M. Cooper for Appellants.

Thomas C. Lynch, Attorney General, Charles A. Barrett, Assistant Attorney General, Sanford N. Gruskin, Deputy Attorney General, Harold W. Kennedy, County Counsel, Edward H. Gaylord, Assistant County Counsel, Roger Arnebergh, City Attorney, Bourke Jones, Assistant City Attorney and Claude E. Hilker, Assistant City Attorney, for Respondents.

By this action for declaratory relief and an injunction, plaintiffs have challenged the constitutionality of certain legislation enacted in 1963 and known as the "Truth in Endorsements Law." Elec. Code, § 8600, et seq.) Specifically exempted from the above challenge are section 8601, subdivisions 1 and 2, and section 8602. Defendants had judgment on the pleadings; in addition to denying an injunction, the judgment declared that section 8600, section 8601, subdivisions 3 and 4, and sections 8603 through 8606 of the Elections Code are constitutional and may be constitutionally applied to all of the plaintiffs.

The legislation provides, in brief, that every advertisement which (1) makes reference to any candidate

for nomination for partisan office in a direct primary and (2) contains a statement to the effect that the candidate has been endorsed by an organization using as a part of its name the name of a political party, shall (3) bear a notice that the organization is an unofficial political group.[1] California Democratic Council is concededly a group of volunteer, unpaid party members not acting in an official party capacity; the individual plaintiffs are either members of the above organization or intend to seek its pre-primary endorsement for public office. It is alleged that neither the individual plaintiffs, nor plaintiff California Democratic Council, desire to print material relating to their pre-primary endorsements on the form of notice prescribed by one of the subject statutes, namely, that it be in type or lettering at least half as large as the type or lettering of the statement and set apart from any other printed matter in a drawn or printed box. It is further alleged that any attempt to print or distribute literature in violation thereof subjects plaintiffs to restraint by injunction and the possible application of penal sanctions, thus inhibiting them in the exercise of their political rights.

Plaintiffs first assert that the legislative measures in question infringe on freedom of speech and of the press as guaranteed by the federal and state Constitutions—this, in addition to the restraint said to be imposed on their right of free association in the electoral process, citing *Fort v. Civil Service Commission,* 61 Cal. 2d 331, 334-335. We find this contention untenable. While

[1]If the advertisement is intended for broadcast or telecast by radio or television, the notice shall be read in full instead of printed.

our state Constitution declares that "All political power is inherent in the people" (Cal. Const., art. I, § 2), we are here concerned with laws enacted pursuant to a constitutional amendment which expressly empowers the Legislature to establish tests governing the right of political parties to participate in primary elections. (Cal. Const., art. II, § 2½.) The broad regulatory power thus given includes authority "to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such election." Almost 50 years ago, in *Heney v. Jordan,* 179 Cal. 24, 27-28, the court declared that "the question as to what provisions are essential to attain the objects contemplated by section 2½, article II, of the constitution, is one peculiarly within the domain of the legislative department, which is practically given plenary power in the matter, that the presumption is in favor of the validity of any provision made, and that if there is any theory upon which the provision might reasonably have been concluded by the legislature to be essential, the courts may not interfere."

It may not fairly be argued that the statutes under attack do not serve to attain the legitimate objective of requiring, as was stated in *Heney, supra,* that "all party nominations to be made directly by the members of the party at a primary election." (p. 31.) Such nominations cannot intelligently be forthcoming when there is doubt and confusion as to whether pre-primary endorsements are those of an official governing body of a political party or otherwise. Indeed, section 8602 of the Elections Code (specifically exempted from challenge) prohibits even official government bodies of political parties, formally listed in the statute, from en-

dorsing any candidate for partisan office in the direct primary. In this connection, the Legislature went to the lengths of adopting certain findings (Elec. Code, § 8601); subdivision 3 thereof finds that "Over the several years preceding the adoption of this section organizations of electors using as a part of their names the name of a political party qualified to participate in the direct primary election have endorsed candidates for nomination of that party . . . and have publicized and promulgated such endorsements in a manner which has resulted in considerable public doubt and confusion as to whether such endorsements are those of a private group of citizens or of an official governing body of a political party." Not only must we assume that the Legislature has realistically and by reasonable means attempted to remedy, in the public interest, a situation which it found to be particularly prevalent (*Lelande v. Lowery,* 26 Cal. 2d 224, 234), but we are faced with the "conclusive presumption" that "the governor and the legislature have performed their duty, and ascertained the existence of the fact before enacting or approving the law . . ." (*Smith v. Mathews,* 155 Cal 752, 756.)

There is also a finding by the Legislature (§ 8601, subd. 4) that "The voting public is entitled to protection by law from deception in political campaigns in the same manner and for the same reasons that it is entitled to protection from deception by advertisers of commercial products." Over the years, of course, there has been considerable decisional law supporting the police power of legislative bodies to prohibit deceptive or misleading statements as they pertain to commercial advertising. See *Serve Yourself Gas etc. Assn. v Brock,* 39 Cal. 2d 813, and cases there cited. Even if literally

true, the statements may be actually misleading and subject to regulation. *(Donaldson v. Read Magazine,* 333 U.S. 178 [68 S. Ct. 591, 92 L. Ed. 628]). Too, misleading statements may be prohibited even if published without any fraudulent intent. *(Dodge Stationery Co. v. Dodge,* 145 Cal. 380.) While cited by the parties to no statute or decision directly in point, we are not persuaded (as appellants urge us to hold) that the above analogy by the Legislature is an unreasonable one. True, "votes are not oleomargarine," but the analogy bears a reasonable relationship to the objectives to be attained by the legislation in question.

But, say appellants, under the guise of preventing the dissemination of misleading literature the present legislation constitutes a form of "self-censorship." They cite *New York Times Co. v. Sullivan,* 376 U.S. 254 [84 S. Ct. 710, 11 L. Ed. 2d 686], which uses the terminology just quoted, for the claim that such censorship is to be avoided because "it dampens the vigor and limits the variety of public debate." The cited decision is also relied on by the appellants for the contention that sections 8603-8606 cannot "be justified in the interest of preventing even an implication of falsehood." The *Times* case, however, which struck down an Alabama libel statute is distinguishable from our case. In the first place, it was concerned with the contents of a publication, not the identity or status of the author. A second distinction is pointed out in *Canon v. Justice Court,* 61 Cal. 2d 446, where the court was confronted with another disclosure, namely, section 12047 of the Elections Code.[2] After according recog-

[2]Section 12047, briefly, makes it a misdemeanor for any person to write or distribute any material designed to injure or defeat

nition to the consideration noted in the *Times* case, *supra*, that it is "of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages," the court declared: "There is a crucial difference, however, between the interests at stake in a libel case and those involved in the enforcement of a purity of elections statute. In the former, we juxtapose against free speech the risk of harm to the reputation of an individual. . . . However, the disclosure requirement of section 12047 does far more than protect the reputation of candidates. It furthers the very ends sought to be achieved through the right of free speech, to wit, "that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. [Citations.] This end is attained when the will of the people is an undeceived, well-informed will." (p. 458). The statute was held to pass "the freedom of speech barricade." (p. 460.)

Finally, with respect to the guarantees of free speech and of the press, it should be emphasized that the sections do not curtail the right to endorse any candidate; they merely require that the use of the name of a political party not mislead the voters. In other words, the use of the political party's name is not prohibited, but only the use of that name in a manner that might tend to create a misimpression, albeit wholly unintended. These requirements do not violate the right of free speech. To the contrary, they serve a legitimate gov-

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any candidate for public office unless such material discloses in a conspicuous place thereon the name and address of the officers of the organization so issuing the material, or the name and address of "some voter of this State," if any, who is responsible for it. Solely on the ground that it applied only to voters and thus resulted in an arbitrary classification, the statute was held invalid.

ernmental interest and thus distinguish the present proceeding from such cases as *National Asso. For The A. C. P. v. Alabama,* 357 U.S. 449 [78 S. Ct. 1163, 2 L. Ed. 2d 1388] and *Bates v. Little Rock,* 361 U.S. 516 [80 S. Ct. 412, 4 L. Ed. 2d 480], relied on by appellants; as pointed out in *Canon v. Justice Court, supra,* 61 Cal. 2d 446, 455, "in those cases 'there was no showing of any danger inherent in concealment, no showing that the State, in seeking disclosure, was attempting to cope with any perceived danger.'"

It is also urged that sections 8603-8606 are violative of due process in that they do not prevent the evil which the Legislature by their enactment sought to curb. Appellants assert: ". . . If the evil which is troubling the legislature is deception, it may be reached by easily drafted legislation: Forbid the intentional fraud of stating that a group is the official party." They further assert that "no 'public doubt or confusion' about pre-primary endorsements by bona fide volunteer groups has ever come within the area of legislative investigation." The simple answer to the above claim and assertions is that the Legislature has expressly determined that statements of the kind prescribed do in fact tend to confuse the voting public. (§ 8601, subd. 3.) We must conclusively presume that the executive and legislative branches "have performed their duty, and ascertained the existence of the fact before enacting or approving the law. . . ." (*Smith v. Mathews, supra,* 155 Cal. 752, 756.)

Next, it is contended that the notice requirements found in the challenged sections impose a heavy unconstitutional burden on persons seeking to publicize pre-primary endorsements. Pointing out that the legis-

lation authorizes the use of an injunction, appellants complain that such preventive proceedings may be initiated after a large amount of money has been spent, the printed matter is ready for distribution, or just before the billboards are posted. The legislation, appellants also contend, creates a presumption of guilt by the finding that a certain type of publication has confused the voting public. Lastly, and cases said to support the claim are cited, it is argued that burdens which inhibit publication or create pressures (such as criminal sanctions) against persons so publishing violate the First Amendment. It is settled, however, that the constitutionality of a statute depends upon whether the benefit to the public outweighs the burden on the individual. Said the court in *Canon v. Justice Court, supra,* 61 Cal. 2d 446, 456: "The crucial question, then, is whether the end to be achieved by the disclosure requirement justifies the resulting impairment of freedom of expression. Certainly, not every infringement upon freedom of speech, of whatever degree and without regard to any countervailing interest, is constitutionally forbidden." The Legislature has determined the danger inherent in the proscribed form of endorsement; we cannot say that it does not outweigh what the realities tell us would be a minor economic burden. Nor does the power to resort to the injunctive remedy make the legislation unconstitutionally burdensome. The manner in which the several prohibitions are enforced is peculiarly within the discretion of the Legislature. (*Kingsley Books v. Brown,* 354 U.S. 436 [77 S. Ct. 1325, 1 L. Ed. 2d 1469].) The same case is also authority for the rule that it is a matter within the legislative body's range of choice whether enforcement be had by

a criminal prosecution or by an injunction or by both of these remedies. Finally, contrary to appellants' suggestion, section 8601 creates no presumption of guilt. A legislative finding that some type of publication creates confusion or doubt in the minds of voters does not establish a presumption that a certain person or organization has printed or distributed such material.

It is also asserted that the legislation arbitrarily discriminates against a special class of citizens. Specifically, if the group of citizens uses their individual names, describing themselves as Democrats or Republicans, they escape the force of the statute; if, however, they use a collective name, they must comply with the challenged legislation. Too, the legislation is not applicable to organizations which do not have the name of a political party, such as organized labor groups and veterans organizations. As for the first of the above claims, section 8602 (which is not challenged) prohibits deception by an express statement and applies to all individuals or organizations: ". . . . No candidate for such nomination shall claim, nor *shall any other person claim on his behalf,* that he is the official candidate or the officially endorsed candidate of that party." (Emphasis added.) With regard to the second of the two arguments, the requirement that a misleading impression be corrected (as provided by sections 8603-8606) is applicable to all those organizations whose names mislead by the inclusion therein of a political party's name or a derivative thereof.[3] Further dispositive of the point is the failure of appellants "to rec-

[3]For purposes of illustration, respondents point out, "An endorsement by the Richard Roe Club . . . would not tend to imply that either the endorsement or the club was official. . . ."

ognize the rule that, when a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification" *(Professional Fire Fighters Inc. v. City of Los Angeles,* 60 Cal. 2d 276, 289): and, as already discussed, the Legislature has made a finding as to the existence of the pertinent facts.

There is likewise no merit to appellants' claim that sections 8603 through 8606 are unconstitutionally vague and indefinite. The governing standard was recently restated in *Canon v. Justice Court, supra,* 61 Cal. 2d 446, 540: "The language of the section is understandable to people of ordinary intelligence and gives adequate warning of the conduct prescribed . . . 'That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." [Citations.]" Any endorsement by California Democratic Council would clearly fall within the provisions of the challenged statues; in view of this determination, we do not consider several hypothetical situations posed by appellants which could not concern them in light of their admitted status.

Finally, it is asserted that the legislation invades a field preempted by Congress. They rely on section 326, Title 47, United States Code, and *Allen B. Dumont Laboratories v. Carroll,* 184 F. 2d 153. Section 326 provides that the Federal Communications Commission has no censorship power over radio communications, nor the power to make regulations interfering with the right

of free speech by means of radio. While there is broad language in the *Dumont* case to the effect that Congress has occupied the field of television regulation (and that said field is no longer open to the several States), a later Supreme Court decision, comparing the *Dumont* case, notes that the holding in *Dumont* was the narrow one of deciding that state censorship of motion pictures (shown on television) was preempted by a federal statute dealing with communications containing profane or obscene words. *(Head v. Board of Examiners,* 374 U.S. 424, 431 (footnote 10) [83 S. Ct. 1759, 10 L. Ed. 2d 983].) There are no provisions of the Federal Communications Act which deal with pre-primary endorsements, a matter of peculiar state concern; nor have we been cited to any other federal statute which can be said to conflict with the subject legislation.

This last contention, therefore, cannot be sustained.

The judgment is affirmed.

Lillie, *J.*

We concur:

Wood, *P. J.*

Fourt, *J.*

## APPENDIX B.

### Judgment for Defendants on the Pleadings.

Superior Court of the State of California, for the County of Los Angeles.

California Democratic Council, et al., Plaintiffs, vs. Roger Arnebergh, et al., Defendants. No. 831813.

In the above entitled case motion was made for judgment on the pleadings on March 31, 1964, in Department 67 of the above-entitled Court, the Honorable Shirley M. Hufstedler, Judge presiding, the Plaintiffs being represented by Leon M. Cooper; the Defendants Roger Arnebergh and City of Los Angeles being reprsented by Roger Arnebergh, City Attorney, Bourke Jones, Assistant City Attorney, Claude E. Hilker, Assistant City Attorney, by Claude E. Hilker; the Defendants William B. McKesson and the County of Los Angeles, being represented by Harold W. Kennedy, County Counsel; and Edward H. Gaylord, Assistant County Counsel, by Edward H. Gaylord; and the Defendants Stanley Mosk and State of California being represented by Stanley Mosk, Attorney General, Charles A. Barrett, Assistant Attorney General, and Sanford M. Gruskin, Deputy Attorney General, by Sanford M. Gruskin, and it appearing to the Court that the First Amended Complaint as amended, does not state facts sufficient to constitute a cause of action for an injunction and cannot be amended to do so, and it further appearing to the Court that the amended complaint, as amended, sufficiently states facts upon which this Court may make a declaration as to the constitutionality of those sections of the Elections Code involved in this proceeding.

It Is Now Ordered, Adjudged and Decreed:

I

Plaintiffs are not entitled to an injunction or to any other relief by their action except the declarations hereafter made in this judgment.

II

Section 8600, the third and fourth paragraphs of Section 8601, and Sections 8603 through 8606 of the Elections Code are constitutional and may be constitutionally applied to all of the plaintiffs and to each of them.

III

The defendants are entitled to judgment for their costs taxed in the sum of $....., against the plaintiffs, California Democratic Council, a California corporation, Tom B. Carvey, Jr., on behalf of himself and all members of the California Democratic Councel and organizations affiliated therewith who are similarly situated, George E. Brown, Jr., Thomas M. Rees and Charles Warren.

Dated: April 9, 1964.

S. M. Hufstedler
Judge

## APPENDIX C.

*An act to add Chapter 4 (commencing with Section 8600) to Division 6 of the Elections Code, relating to the endorsement of candidates.*

*The people of the State of California do enact as follows:*

Section 1. Chapter 4 (commencing with Section 8600) is added to Division 6 of the Elections Code, to read:

### Chapter 4. ENDORSEMENT OF CANDIDATES FOR PARTISAN OFFICES.

8600. This chapter shall be known and may be cited as the Truth in Endorsements Law.

8601. The Legislature hereby finds the following to be true:

(1) The major political parties have become an integral part of the American governmental system requiring regulation as to their structure, governing bodies, and functions by state government in the public interest.

(2) The Legislature has found it necessary and appropriate in the regulation of political parties to create and provide for the convening of state conventions; state central committees, and county central committees for the parties qualified by law to participate in the direct primary election, by statute.

(3) Over the several years preceding the adoption of this section organizations of electors using as a part of their names the name of a political party qualified to participate in the direct primary election have endorsed candidates for nomination of that party for

partisan office in the direct primary election and have publicized and promulgated such endorsements in a manner which has resulted in considerable public doubt and confusion as to whether such endorsements are those of a private group of citizens or of an official governing body of a political party.

(4) The voting public is entitled to protection by law from deception in political campaigns in the same manner and for the same reasons that it is entitled to protection from deception by advertisers of commercial products.

8602. The state convention, state central committee, and the county central committee in each county are the official governing bodies of a party qualified to participate in the direct primary election. The state convention, state central committee, and the county central committee in each county shall not endorse, support, or oppose, any candidate for nomination by that party for partisan office in the direct primary election. No candidate for such nomination shall claim, nor shall any other person claim on his behalf, that he is the official candidate or the officially endorsed candidate of that party.

8603. Every advertisement, bill, placard, pamphlet or other printed or duplicated matter having reference to any candidate for nomination for partisan office in the direct primary election, which contains a statement or words to the effect that the candidate has been endorsed or is being supported by a political party, political party organization, or organization using as a part of its name the name of a political party or derivative thereof, shall bear on each surface, page, or fold thereof on which such statement or words appear, or on the

front and back surface thereof, in type or lettering at least half as large as the type or lettering of such statement or words or in 10-point roman type, whichever is larger, in a printed or drawn box and set apart from any other printed matter, the following statement:

NOTICE TO VOTERS
(Required by law)

The endorsement hereon is by an unofficial political group. Official organizations of the (name) Party are prohibited by law from endorsing candidates in primary elections.

Nothing in this section shall be construed to apply to any news item, comment, or article, for which no consideration, direct or indirect, is paid by or on behalf of any candidate or committee, and which is published in any regularly published newspaper or magazine which in the ordinary course of business publishes political news items, comments, or articles.

8604. Notwithstanding any provision of Section 8603, in the case of any post card published and circulated by or in behalf of any committee or organization using as a part of its name the name of qualified political party or derivative thereof, which post card is not folded and consists of only two surfaces, on one or both of which surfaces appear a statement or words as described in Section 8603 with reference to a candidate or group of candidates in the direct primary election, the requirements of Section 8603 shall be satisfied if there is printed on both surfaces thereof the words "published by", followed by the name of the com-

mittee or organization printed in not less than 10-point boldface type, followed by the words ", an unofficial political group" printed in not less than 10-point boldface type, provided that this section shall not be construed so as to modify the requirements of Section 11592, and further provided that this section shall not apply to any matter which bears the word "official" followed by the name of the party or derivative thereof, or the words "officially endorsed", or to any matter which violates the provisions of Section 8602.

8605. The requirements of Section 8603 shall apply to any paid political advertisement intended for broadcast or telecast by radio or television, except that the "Notice to Voters" required by Section 8603 shall be read in full instead of printed.

8606. In addition to any other penalty, no payment shall be made or allowed to any person in consideration for his having prepared, printed, published, or circulated, or assisted in the preparation, printing, publishing, or circulating of any advertisement, bill, placard, poster, or other printed or duplicated matter in violation of Section 8603. Any person who knowingly pays or receives a payment in violation of this section is guilty of a misdemeanor.

The Superior court, in any case brought before it by any registered voter, may issue a temporary or permanent restraining order or injunction against the publication, printing, circulation, posting, broadcasting, or telecasting of any matter in violation of this chapter, and all cases of this nature shall be in a preferred position for purposes of trial and appeal, so as to assure the speedy disposition thereof.

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IN THE

# Supreme Court of the United States

October Term, 1965
No. 583

CALIFORNIA DEMOCRATIC COUNCIL, *et al.*,

*Appellants,*

*vs.*

ROGER ARNEBERGH, *et al.*,

*Appellees.*

**On Appeal From the District Court of Appeal of the State of California, Second Appellate District, Division One.**

## MOTION TO AFFIRM OR DISMISS.

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IN THE

# Supreme Court of the United States

October Term, 1965
No. 583

CALIFORNIA DEMOCRATIC COUNCIL, *et al.*,

*Appellants,*

*vs.*

ROGER ARNEBERGH, *et al.*,

*Appellees.*

**On Appeal From the District Court of Appeal of the State of California, Second Appellate District, Division One.**

## MOTION TO AFFIRM OR DISMISS.

Appellees, pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States, move that the judgment of the District Court of Appeal of the State of California, Second Appellate District, be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to warrant further argument. In the alternative, appellees move that the within appeal from the decision of the District Court of Appeal be dismissed on the same ground.

## Opening Statement.

The judgment of the District Court of Appeal of the State of California, Second Appellate District, 233 A.C.A. 508, 43 Cal. Rptr. 531 (1965); upholds the validity of section 8600, the third and fourth paragraphs of section 8601, and section 8603 through 8606 of the California Elections Code. Appellants contend that these sections violate the provisions of the First and Fourteenth Amendments of the Constitution of the United States because said sections allegedly impair freedom of speech, are vague and indefinite, discriminatory, and insofar as they apply to broadcasting, in conflict with federal statutes.

The challenged provisions require that every advertisement having reference to any candidate for nomination for partisan office in the direct primary election, which contains a statement to the effect that the candidate has been endorsed by an organization using as a part of its name the name of a political party or derivative thereof, shall bear a notice that the organization is an unofficial party group and that official organizations of political parties are prohibited by law from endorsing candidates in primary elections.[1]

A related provision of the Elections Code, section 8602, was not challenged below and is not challenged

[1]If the advertisement is intended for broadcast or telecast by radio or television, the notice shall be read in full instead of printed. Cal. Elec. Code § 8605.

by the appellants in this Court. Section 8602 designates the State Convention, State Central Committee, and the County Central Committee in each county as the official governing bodies of a party qualified to participate in the direct primary election; prohibits official governing bodies from making pre-primary endorsements; and further prohibits all persons from claiming that a candidate is the official candidate or the officially endorsed candidate of a party.

Although appellants' contentions present, in the abstract, a number of federal questions, the decision of the State court on these questions was so clearly correct that their further consideration by this Court is not necessary.

## ARGUMENT.

### I.

### The Challenged Provisions of the Elections Code Do Not Violate the Rights of Free Speech, Free Press, or Free Assembly.

#### A. The Provisions of the Elections Code Constitute Reasonable Regulations to Prevent Misunderstanding by the Voters.

The essence of a direct primary election in California is that the selection of a party's candidates is withdrawn from party conventions and caucuses, and that the unfettered choice of each party's candidates is placed in the hands of the voters at the primary election. *Heney v. Jordan,* 179 Cal. 24, 31, 175 Pac. 402, 405 (1918); *Hart v. Jordan,* 168 Cal. 321, 323, 143 Pac. 537, 538 (1914).

Such a choice cannot be made intelligently where there is doubt and confusion as to whether pre-primary endorsements are those of a private group of citizens, or an official governing body of a political party, or otherwise.

The California Legislature has expressly found that considerable doubt and confusion on this subject has existed in the minds of the voting public. In section 8601 of the Elections Code, the Legislature found:

> "(3) Over the several years preceding the adoption of this section organizations of electors using as a part of their names the name of a political party qualified to participate in the direct primary election have endorsed candidates for nomination of that party for partisan office in the direct primary election and have publicized and promul-

gated such endorsements in a manner which has resulted in considerable public doubt and confusion as to whether such endorsements are those of a private group of citizens or of an official governing body of a political party."

And in section 8601, the Legislature further found:

"(4) The voting public is entitled to protection by law from deception in political campaigns in the same manner and for the same reasons that it is entitled to protection from deception by advertisers of commercial products."

The matter is one peculiarly within the knowledge of the members of the Legislature since each of them participated and campaigned in a primary election in order to obtain his seat in the Legislature. Moreover, it must be presumed that "the governor and the legislature have performed their duty, and ascertained the existence of the fact before enacting or approving the law . . ." *Smith v. Mathews,* 155 Cal. 752, 756 (1909).

Certainly, it cannot reasonably be said that these legislative findings are arbitrary. The name, "California Democratic Council" would imply to most voters, including many attorneys whose practice does not include election matters, that the California Democratic Council is an official organization of the Democratic Party in California, and that the candidates endorsed by it are endorsed by the Democratic Party itself.

It would be, to paraphrase the words of Mr. Justice Frankfurter in *Beauharnais v. Illinois,* 343 U.S. 250, 263 (1952), "arrant dogmatism, quite outside the scope of [this Court's] authority in passing on the powers of a State," for this Court to deny that the California

Legislature might warrantably believe that a statement to the effect that "X" is endorsed by an organization whose name contains the word "Democrat" would tend to mislead or confuse the voters as to whether the endorsement is that of a private group of citizens or that of an official governing body of the Democratic Party. It would similarly be outside the scope of this Court's authority to deny that the California Legislature might warrantably believe that this is a problem which deserved legislative action pursuant to the powers conferred upon the Legislature to regulate and control primary elections and the terms and conditions under which electors and organizations may participate therein (Cal. Const., art. II, § 2.5).

The challenged provisions of the Elections Code merely prohibit deceiving the public. The right of free speech (even in non-commercial matters) does not include the right to deceive (*United States v. Rutherford* [*C.C.A.* N.Y. 1964], 332 F.2d 444, 446, cert. denied 377 U.S. 994), or the right to make knowingly false statements (*Garrison v. Louisiana*, 379 U.S. 64, 75 [1964]).

The quotation from *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964), at page 16 of appellants' Jurisdictional Statement—"That erroneous statement is inevitable in free debate . . ."—can have no application here. Appellant, California Democratic Council, concedes that it is not an official party organ. Any implication that its endorsement is an official endorsement of the Democratic Party is, therefore, known in advance to be, and is admitted to be false.

The challenged provisions of the Elections Code are not concerned with the contents of a publication. They do not prevent any of the appellants from making pre-

primary endorsements. Said sections merely prohibit doing so in a way which implies that the endorsement is by an official party organ.

These sections of the Elections Code, unlike the city ordinance involved in *Talley v. California,* 362 U.S. 60 (1960), do not prohibit anonymity. They only prohibit the false implication of who the sponsor is. A person may have a right to refuse to identify himself (although not under all circumstances[2]), but can it seriously be claimed that he has a right to give a misleading identification?

**B. Elections Code Sections 8603-8606 Do Prevent the Evil Which the Legislature Seeks to Curb.**

Appellants assume that the only evil requiring a remedy is that of intentionally and falsely stating that a group is an official party organ (Juris. St., p. 21). This matter is already covered in part by the last sentence of section 8602 of the Elections Code:

> ". . . No candidate for such nomination shall claim, *nor shall any other person claim on his behalf,* that he is the official candidate or the officially endorsed candidate of that party." (Emphasis added.)

The word "person" as used in California laws, includes artificial as well as natural persons. *Douglass v. Pac. M.S.S. Co.,* 4 Cal. 304, 306 (1854); *Western U. Tel. Co. v. Superior Court,* 15 Cal. App. 679, 695 (1911).

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[2]*Lewis Publishing Co. v. Morgan,* 229 U.S. 288 (1913); *United States v. Harriss,* 347 U.S. 617, 625 (1954); *United States v. Scott,* 195 F. Supp. 440, 443 (N.D. 1961); *Canon v. Justice Court,* 61 Cal. 2d 446, 453; 39 Cal. Rptr. 228, 231; 393 P.2d 428, 431 (1964).

Voters, however, are entitled to protection from more than just intentional fraud. The purpose of the legislation is not to punish the speaker or publisher, but rather to protect the voters from being misled into believing that any candidate is the official candidate of a political party. Neither the literal truth of the statement, nor the innocent intent in making it will protect those members of the public who, quite naturally, but mistakenly, assume that since appellant's name includes the word "Democratic" it is an official organization of the Democratic Party, and its endorsement is the official endorsement of the Democratic Party.

This Court has acted before to uphold prohibitions against the use of a misleading name, even though the name was innocently adopted. See *American Airlines v. North American Airlines,* 351 U.S. 79, 86 (1956).

The appellants know the California Democratic Council is not an official party organ. The situation here is not like that in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), or *Garrison v. Louisiana,* 379 U.S. 64 (1964), where false statements were made, but they were not known to be false.

Not only do appellants know that the California Democratic Council is not an official party organization (as they themselves emphasize at pages 12 and 13), but they have been informed by the Legislature that the use of that name in connection with pre-primary endorsements, without explanation, misleads voters. Yet, they do not wish to give the notice prescribed by the

statute. This is the very type of conduct condemned in *Fed. Trade Comm'n v. Algoma*, 291 U.S. 67, 81 (1934):

> ". . . Indeed there is a kind of fraud, as courts of equity have long perceived, in clinging to a benefit which is the product of misrepresentation, however innocently made. . . ."

Appellants say:

> ". . . No attempt is made to masquerade as the official party organization. As a matter of fact, great pride is taken in the status of the California Democratic Council as a group of volunteers, unpaid party members not acting in any official capacity." (Juris. St. pp. 12-13.)

Why then do appellants object so vigorously to stating the fact in which they take such great pride?

**C. The Notice Provisions of Sections 8603-8606 Do Not Inhibit Free Expression of Free Association. Any Burden Imposed by the Statute Is Outweighed by the Benefit to the Public.**

Sections 8603-8606, it is respectfully submitted, do not tend to inhibit or restrict freedom of speech, freedom of the press, or freedom of association. They do not govern, dictate or control what appellants may include in their campaign literature. They only require that a statement be made to counteract the implication that appellant California Democratic Council's endorsement is that of an official governing body, an implication which the Legislature has reasonably determined arises from the fact that said appellant's name includes the word "Democratic." The required statement is truth-

ful and the implication which it is intended to negate is false.

Even assuming, *arguendo,* that the notice requirements might have a tendency to inhibit the making of endorsements, such an effect would be minimal. In any event, any economic burden or inhibiting effect on free expression or on free association is far outweighed by the benefit accruing to the voting public from the challenged provisions of the statute. The constitutionality of a statute infringing freedom of speech depends on a balancing of the deterrent effect on the enjoyment of individual liberties, if any, with the importance of the governmental interest giving rise to the statute in question. *Communist Party v. Control Board,* 367 U.S. 1, 91 (1961); *Garrison v. Louisiana,* 379 U.S. 64, 75 (1964); *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942).

## II.

## The Challenged Statute Does Not Place an Unconstitutional Burden on Appellants or Other Persons Seeking to Publicize Pre-Primary Endorsements.

### A. The State Legislature May Authorize the Use of an Injunction.

At page 25 of their Jurisdictional Statement, appellants say:

> "This legislation also inhibits free expression through civil judgment in injunctive proceedings. . . . The injunction may be sought at that crucial moment after a large amount of money has been paid and the printing is published and ready to be distributed or just before the billboards are posted. Then the injunctive proceeding is initiated. . . ."

Appellants however, are protected by the rule that:

> ". . . The application [for a temporary injunction] should also be made promptly, and not delayed until large expenditures have been made by the defendants. . . ."
>
> *Real Del Monte Mining Co. v. Pond Mining Co.*, 23 Cal. 82, 84 (1863);

also see:

> *Schwartz v. Arata*, 45 Cal. App. 596, 606, 188 Pac. 313, 317 (1920).

Appellants also are protected by the rule that the granting of a restraining order is within the sound discretion of the Court and must be exercised in favor of the party most likely to be injured. *Real Del Monte Mining Co. v. Pond Mining Co., supra; McCoy v. Matich*, 128 Cal. App. 2d 50, 52, 274 Pac. 714 (1954); *Riviello v. Journeymen Barbers etc. Union*, 88 Cal. App. 2d 499, 510, 199 P.2d 400 (1948). It must be assumed that a temporary injunction will not be granted unless the threat of violation appears almost certain otherwise.

Since the prohibitions in sections 8603, 8604 and 8605 are valid, the manner in which these prohibitions are to be enforced—whether by criminal prosecution or by injunction or by both—is a matter within the discretion of the Legislature. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 440-41 (1957).

If, a few days before the primary election, literature is circulated which states that the California Democratic Council endorses Richard Roe, without an explanation that the Council is an unofficial party organization, many voters may cast their ballots for Richard Roe solely because they believe he is the candidate officially

endorsed by the Democratic Party. Obviously, such a misconception must be prevented prior to the primary election in order to serve the objectives of the statute. After the primary election, neither an injunction nor any other remedy can right the wrong done to the public.

**B. The Legislature Has Not Attempted to Create a Presumption of Guilt.**

At page 29 of their Jurisdictional Statement, appellants say:

> "Moreover, the legislature may not declare by some type of finding that a person is guilty and thrust upon that person the burden of proving his innocence. . . ."

Appellants seem to contend that the Elections Code prohibits an organization such as appellant, California Democratic Council, from representing that it is an official party organ, and then provides that the use of a name containing the name of a political party results in a presumption that the organization is so representing itself. This is not true.

The statute requires that a statement to the effect that an organization such as appellant, California Democratic Council, endorses or supports a candidate, must bear the prescribed notice. The statute prohibits making or allowing a payment for printing, publishing or distributing such a statement without the prescribed notice. No presumption of guilt is involved. The statute creates no presumption that any person or organization has printed, published or distributed such a statement of endorsement without giving the required notice; nor

does the statute create a presumption that any one has made or accepted a payment in consideration of such act or acts.

Appellants confuse the legislative finding of necessity with a legislative presumption of guilt. Every prohibitory statute or ordinance is based upon a finding or determination by the legislative body that the activity prohibited is detrimental to the public. No presumption of guilt results therefrom. This is especially true in the instant case where the activity prohibited is with respect to communications which have a natural tendency to mislead the public, even though the communication may be true and may be made with no intent to deceive.

III.

**The Challenged Provisions of the Statute Do Not Violate Constitutional Guarantees of Equality Before the Law.**

Appellants claim that the notice provisions of sections 8603-8606 are discriminatory because they apply to endorsements by appellant, California Democratic Council, but do not apply to endorsements by organizations which do not have the name of a political party as a part of their names, and do not apply to individuals who make endorsements (Juris. St. pp. 29-31). This Court has on many occasions said:

> ". . . the equal-protection clause does not preclude the states from resorting to classification for the purposes of legislation. It only requires that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly cir-

cumstanced shall be treated alike.' Colgate v. Harvey, 296 U.S. 404, 422, 423, and cases cited."

*Old Dearborn Co. v. Seagram,* 299 U.S. 183, 197 (1936).

And this Court has also said:

". . . It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. . . . It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety."

*Rast v. Van Deman & Lewis Co.,* 240 U.S. 342, 357 (1916).

Also see:

*Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 528 (1959); and

*Rapid Transit Corp. v. New York,* 303 U.S. 573, 578 (1938).

In the instant case we need not search for "any state of facts [which] reasonably can be conceived that would sustain" the challenged portions of the statute. The Legislature has expressly stated what those facts are and found them to be true in section 8601(3) of the Elections Code.

The purpose of chapter 4 of division 6 of the Elections Code is to prevent deception of the public not only by: (a) express statements that an endorsement constitutes the official endorsement of a party; but also by (b) implied statements to that effect.

The prevention of deception by express statements is accomplished by the provisions of section 8602 which provide, in part, as follows:

> ". . . No candidate for such nomination shall claim, nor shall any other person claim on his behalf, that he is the official candidate or the officially endorsed candidate of that party."

This prohibition in section 8602 applies, of course, to all individuals, and to organizations which include within their name the name of a political party or derivative thereof, as well as to organizations which do not include within their name such a name or derivative thereof.

The prevention of deception by implication is accomplished by the notice in endorsement provisions of sections 8603-8606. While these provisions do not apply to organizations which do not use the name of a political party or derivative thereof, there is a natural, intrinsic and reasonable distinction between the two that has a substantial relationship to the purpose for which the legislation was designed. An endorsement by the Richard Roe Club, for example, would not tend to imply that either the endorsement or the club was official (unless it was expressly so stated, in which event there would be a violation of section 8602).

A better example of a valid classification would be difficult to find. The requirement that a misleading impression be corrected applies only to those organizations whose names mislead. It applies to all such organizations. There is here not only a reasonable correlation between the class and the evil to be corrected, which is all that is necessary, but an *exact* correlation.

## IV.

## Elections Code Sections 8603-8605 Are Neither Vague nor Indefinite.

Contrary to the assertions on pages 31-34 of appellants' Jurisdictional Statement, the provisions of sections 8603-8605 are neither vague nor indefinite.

The guiding principles are succinctly summarized in *Roth v. United States,* 354 U.S. 476, 491 (1957), as follows:

> ". . . This Court . . . has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' United States v. Petrillo, 332 U.S. 1, 7-8. . . . '. . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' Id. 332 U.S. at 7."

In a similar vein, this Court said in *Hygrade Provision Co. v. Sherman,* 266 U.S. 497, 502 (1925):

> ". . . If exceptional cases may sometimes arise where opinions might differ, that is no more than is likely to occur, and does occur, in respect of many criminal statutes either upheld against attack or never assailed as indefinite. . . ."[3]

[3]Also see *Kovacs v. Cooper,* 336 U.S. 77, 80 (1949); *Armenta v. Churchill* 42 Cal. 2d 448, 454, 267 P.2d 303, 307 (1954);

Measured by these principles, appellants' claim of unconstitutional vagueness must fail. Furthermore, since the endorsement of appellant, California Democratic Council, clearly falls within the provisions of sections 8603-8606, this Court need not consider various hypothetical situations posed by appellants which do not, and could not concern them. *Gorieb v. Fox,* 274 U.S. 603, 606 (1927); *United States v. Wurzbach,* 280 U.S. 396 (1930).

Although, as appellants point out (Juris. St., p. 31), the California Supreme Court has said that "a court in considering the claim of overbreadth and vagueness may take into account the operation of the provision as to factual situations other than the one at bar . . ." (*Fort v. Civil Service Commission,* 61 Cal. 2d 331, 339, 38 Cal. Rptr. 625, 630, 392 P.2d 385, 390 (1964)), neither the California Supreme Court nor any other court has said that situations would be considered which *never could* apply to the plaintiff.

This Court does not give advisory opinions. *Zemel v. Rusk,* 381 U.S. 1, 20 (1965); *Federation of Labor v. McAdory,* 325 U.S. 450, 462 (1945). It considers only those questions which directly concern an appellant. An appellant must have standing to sue. *Chamberlin v. Dade County Board of Public Instruction,*

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and *Smulson v. Board of Dental Examiners,* 47 Cal. App. 2d 584, 587, 118 P.2d 483, 484 (1941): ". . . It is not required that even a penal statute, to be valid, have that degree of exactness which inheres in a mathematical theorem."

377 U.S. 402 (1964); *Doremus v. Board of Education*, 342 U.S. 429 (1952).

As Mr. Justice Holmes said in the case of *United States v. Wurzbach*, 280 U.S. 396 at 399 (1930), which upheld a federal statute prohibiting any representative in Congress from soliciting campaign contributions from federal office holders:

> ". . . The objection to uncertainty concerning the persons embraced need not trouble us now. There is no doubt that the words include representatives, and if there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by someone whom it concerns."

## V.

## Elections Code Section 8605 Does Not Invade a Field Preempted by Congress.

At pages 34 and 35 of their Jurisdictional Statement, appellants contend that Congress has occupied the field, relying upon 47 U.S.C. §§ 315 and 326, and *Allen B. Dumont Laboratories, v. Carroll*, 184 F.2d 153 (3d Cir. 1950), cert. denied 340 U.S. 929.

But section 315 of Title 47 of the United States Code is, on its face, inapposite. It requires equal time for candidates and prohibits a licensee from exercising any power of censorship over the material broadcast under the provisions of this section. Furthermore, this section,

". . . applies only to the use of a broadcasting station by a candidate personally and . . . it does not apply to the use of such a station by other persons speaking in the interest or support of a candidate."

*Felix v. Westinghouse Radio Stations,* 186 F.2d 1, 3 (3d Cir. 1950; cert. denied 341 U.S. 909).

Section 326 of Title 47 of the United States Code provides that the Federal Communications Commission has no power of censorship over radio communications, and no power to promulgate regulations interfering with the right of free speech by radio communication.

In *Allen B. Dumont Laboratories v. Carroll, supra,* the United States Court of Appeals ruled that the State of Pennsylvania could not censor television programs for obscenity. Although there is broad language in *Dumont* to the effect that Congress has occupied fully the field of television regulation, and that said field is no longer open to the states, a careful reading of the opinion indicates that the actual holding of the case was narrow. The Court of Appeals held only that the Pennsylvania obscenity control statute was preempted by those provisions of the Federal Communications Act expressly dealing with communications containing profane or obscene words, language, or meaning. 47 U.S.C. § 303(m)(1)(D). On the other hand, there are no provisions of the Federal Communications Act dealing with pre-primary endorsements—the area covered by sections 8603-8606 of the Elections Code.

In *Head v. New Mexico Board*, 374 U.S. 424, 431-32 (1963), the Supreme Court of the United States noted that this was the narrow holding in *Dumont*.[4] In *Head*, this Court upheld a judgment of a state court of New Mexico which enjoined a radio station from broadcasting advertising material found to be in violation of the laws of the State of New Mexico.

Appellants attempt to distinguish the *Head* case on the ground that it involved commercial advertising, whereas political advertising is involved here (Juris. St. p. 35). This is not a valid ground of distinction. Whether Congress has occupied the field is purely a question of statutory construction.

Appellants also rely on *Farmers Union v. WDAY*, 360 U.S. 525, 535 (1959). But *WDAY* is readily distinguishable since it involved an obvious and clear conflict between state law and section 315 of Title 47. In the *WDAY* case, this Court held that a radio station could not be sued for libel by a candidate, where section 315 of Title 47 of the United States Code compelled the station to permit him to broadcast and also prohibited consoring of what he said. Obviously, a state law permitting the recovery of damages for allowing a broadcast which federal law compelled the sta-

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4 ". . . Compare Allen B. Dumont Laboratories v. Carroll, 184 F. 2d 153, which held state censorship of motion pictures shown on television preempted by those provisions of the federal act expressly dealing with 'communications containing profane or obscene words, language, or meaning.' 47 U.S.C. § 303(m)(1)(D)." 374 U.S. at 431 (footnote 10).

tion to allow would be in conflict with that federal law. There is no such conflict here. Therefore, sections 8603-8606 cannot be condemned as in conflict with national legislation. *Federation of Labor v. McAdory,* 325 U.S. 450, 467 (1945).

The legislation attacked by appellants here is most peculiarly a matter of state concern. The method of nominating candidates to run for public office is exclusively controlled by the states, and the methods vary greatly from state to state. It would be impossible to draft federal legislation or regulations of the Federal Communications Commission to accomplish, in all the fifty states of the Union, the purpose of the state legislation now under consideration. Appellants have not cited, nor have we found any federal law or regulation even remotely in conflict with the Elections Code provisions now under consideration. The provisions of the Elections Code are in no way an obstacle to the full effectiveness of the federal statute upon which appellants rely.

**Conclusion.**

The challenged provisions of the statute are reasonable. They require that an organization using the name of a political party shall, by proper notice, eliminate a false impression that the use of such name in connection with pre-primary endorsements conveys to the public. The burden to the organization is slight and is far outweighed by the resulting benefit to the public. The stat-

ute is constitutional and no *substantial* federal question is presented. Appellees' motion to affirm or dismiss should be granted.

Respectfully submitted,

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